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C O N F I D E N T I A L SECTION 01 OF 04 BAGHDAD 003106

SIPDIS

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TAGS: [PREL](#) [PGOV](#) [KDEM](#) [IZ](#)

SUBJECT: PART II OF II: AN ARTICLE-BY-ARTICLE ANALYSIS OF  
THE SHIA-PROPOSAL FOR A CONSTITUTION

REF: A. BAGHDAD 3104

[B](#). BAGHDAD 2981

[C](#). BAGHDAD 3055

Classified By: Political Counselor Robert Ford.  
Reasons 1.4 (B) and (D).

[17](#). (C) EXECUTIVE AUTHORITIES: The document is designed to avoid another extended executive government formation process like that inadvertently offered under the TAL and that took place from January through April 2005. The assembly must convene within 15 days of the announcement of the election results, and the President of Iraq must name the prime minister within 15 days of that opening session. The prime minister, in turn, has 20 days to form a government.

-- PRESIDENT SUBSUMES THE PRESIDENCY COUNCIL: Unlike the TAL, the draft Shia text vests all the authorities of the presidency council in the president alone. The powers of this position hew closely to the TAL. The president would have veto power over National Assembly legislation. The assembly would be able to overturn his veto with a two-thirds vote. The president would also hold ceremonial responsibilities and may grant pardons on the recommendation the prime minister. A single Vice President would exercise minimal authorities -- another deviation from the TAL that would reduce the checks on an energetic executive.

-- PRIME MINISTER'S AUTHORITIES: Prime Ministerial authorities remain similar to those stipulated in the TAL with one significant curtailment. The draft states that the prime minister is unable to fire a member of his own cabinet without approval from the National Assembly by absolute majority. A side-note on the draft states, "This condition would weaken the prime minister and it is best to remove it."

[18](#). (C) JUDICIAL AUTHORITIES: A limited number of the provisions on the judiciary (presumably only intended to address the federal judiciary, though not expressly stated) are drawn from the TAL. The authorities outlined in these provisions are at times not adequately defined or are in tension with other judicial authorities contemplated by this draft. Article 1 of Chapter Three appears to expand the jurisdiction of the judiciary beyond the limits set in the TAL. While the TAL provides for jurisdiction over matters of innocence and guilt and matters arising from the application of federal laws, Article 1 grants the judiciary "exclusive" power to "consider all disputes between people, the natural and the juridical, including the governmental and non-governmental departments." Such exclusive jurisdictional authority seems to be in tension with the existence of the "Regional Judicial Authority" later stipulated in Section 4.

[19](#). (C) Federal judges are to be nominated by the Higher Juridical Council, approved by the National Assembly, and appointed by Presidential decree. The draft creates a federal supreme court (made up of a judicial committee and cassation committee, which are undefined). The Supreme Court would have jurisdiction along the lines of Article 44(B) of the TAL. There is no provision that defines the jurisdictional relationship between the federal courts, including the Supreme Court, and the constitutional court discussed below. Nor is there a provision similar to Article 46(B) of the TAL that grants the federal judiciary the express authority to review local and regional court decisions on matters of federal law. Article 26 of Section Four of this draft, for example, only provides for a law to regulate the relationship between federal and regional judicial authorities.

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Part IV: Institutions  
of the Regional Entities  
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[10](#). (C) The opening article of this section states, "The federal system in (The Federal Iraqi Republic) is comprised of regional entities, governorates, and a

capital." The text immediately departs from the TAL thereafter, devising a much more detailed and expansive set of regional authorities. In some instances, the sovereignty of the regions is appear to conflict with authorities reserved for the central government in Section Five, particularly in the area of electoral systems.

-- NO LIMIT ON MERGERS: Where the TAL allowed no more than three governorates to merge to form a regional entity, the draft document sets no limit on the number of governorates that may merge. It also eliminates the National Assembly's right under the TAL to approve or veto such a move. A final article does, however, proscribe Baghdad from uniting with any another region.

-- TO EACH REGION A CONSTITUTION: Where the TAL left the governing structure of regions open to development, the draft constitution delineates three branches of regional government. More significantly, each regional assembly would be free in its constitution to establish a council of ministers and ministries as it sees fit. The first elected assembly of each regional entity would be charged with drafting a constitution for the region. A side note on the document indicates calls by some delegates for Iraq to have only one constitution. There also is no provision stipulating that regional constitutions may not afford less protection to Iraqi citizens than the national constitution.

-- HOW TO ELECT A REGIONAL PRESIDENT: The draft demonstrates continued divisions over the mechanism for electing the president of each regional entity. One proposal recommends allowing each regional constitution to delineate the process, another recommends one process for the whole nation, and another recommends giving the regional president only ceremonial powers in any event. The draft calls for all candidates for regional president to be citizens of the region and at least 40 years old, although one objection calling for all Iraqis to be able to run anywhere is noted. The president of Iraq is tasked with ratifying the election of regional presidents.

-- OPEN-ENDED REGIONAL AUTHORITIES: The text lays out diplomatic authorities for the regional president that are certain to raise loud objections from those who fear that federalism is a step toward partition. Article 14 reads, "The president of the regional entity represents his region abroad and before the federal authorities and it is he who signs agreements with other regional entities in the Federal Republic of Iraq in accordance with the limits set by the regional constitution." The executive branch of the regional government is further charged with preparing a budget. Another loosely prescribed provision, Article 20, reads, "The regional government specializes in all that the administration of the region demands in all respects and in particular with the administration and organization of the region's internal security forces." The regional governments would also seem to possess a check on the use of Iraq's armed forces within their borders. The text states that the regional government is only able to request the assistance of central government security forces with the approval of the regional legislative council.

-- AN EXPANSIVE PROPOSAL ON REGIONAL DIPLOMATIC AUTHORITY: The draft text includes a recommendation by two delegates that the constitution grant the regional entities rights similar to those offered to areas in Switzerland. This recommendation, which the text notes has met with objections, is offered in Article 22, which reads, "1. Areas may sign agreements with other countries in their areas of specialty or in administrative or local matters. 2. These agreements may not contradict the rights and interests of the union or the rights of the other areas, and these areas are obligated to inform the union of such treaties before signing them. 3. The areas may work directly with foreign entities that are at their level while in some other circumstances their interaction will take place on the level of the federal government."

-- UNCERTAIN STATUS FOR REGIONAL JUDICIAL ENTITIES: The judicial authority in the province is composed of the Regional Juridical Council and the judicial apparatus therein, and the Regional Court of Cassation is the top of the judicial pyramid therein and its consultative council." The relationship between regional and federal judicial authorities remains undefined, though the draft text contemplates that the

national assembly will enact a judiciary law defining the types and jurisdiction of regional courts.

-- A NOD TO UNATTACHED GOVERNORATES: The fifth part of this section of the draft documents echoes TAL language on the authorities of governorate councils and governors. The point of the section is to demonstrate that governorates can function within the federal system even if they do not merge to form regional entities.

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Part V: Constitutional Guarantees  
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11. (C) This section lays out the provisions of the Federal Constitutional Court, Election Commission, and the Commission for Public Integrity. An attached section makes the draft document's clearest effort at proposing solutions to the dispute over revenue sharing between the central government and provinces.

-- POTENTIAL FOR A POLITICIZED CONSTITUTIONAL COURT: The draft text opens greater opportunity for politicians to influence the composition of the constitutional court than that provided in the TAL for the composition of the Federal Supreme Court. TAL Article 44 allows the Higher Juridical Council to propose a pool of nominees from which the presidency council then chooses the nine members of the Constitutional Court. Article 2 of this draft allows the Higher Juridical Council to name only five of the members and makes all of the nominations subject to approval by a two-thirds vote in the National Assembly. The Prime Minister has the right to present the National Assembly with 8 nominees to choose from for the remaining four slots. The language opens the door to the appointment of Islamic scholars as opposed to secular lawyers or judges. Article 2 (B) reads, "Four of the members (will be chosen) from among Sharia scholars, and law professors and those who are lawyers, legal consultants, and those who have served in the field of law for no less than 20 years." Where the TAL grants the presidency council the authority to name the chief justice, this draft text lets the National Assembly elect a President and Vice President.

-- A STRONG (BUT INCONSISTENT) LIST OF CENTRAL GOVERNMENT AUTHORITIES: The first and only two articles of a section entitled "Exclusive Authorities of the Federal Government" assigns to the federal government sole authority over foreign policy, economic, commercial and loan policy; national security and borders; financial and monetary policy; regulating weights and measures; transportation education, environment, health and energy policy. This list of authorities, while broad, is in tension with seemingly overlapping authorities laid out for regional entities in the previous section.

-- MORE EMPHASIS ON IRAQ'S UNITY: Article 1 of this section reads, "The federal government preserves the unity and security and independence of the Iraqi Federal Republic."

-- REVENUE SHARING: The text offers three options on revenue sharing that move from a centralized system to the extreme of decentralization. Article 19 of Part IV of the draft appeared to put off this issue. It reads, "The revenue of the province is composed of the allotment agreed from the natural resources, other regional income, and a grant from the federal government." Part V re-opens the issue and attempts to offer multiple options rather than prescribe a single solution. The three options offered are listed as follows:

-- OPTION A: The wealth of oil and minerals belongs to all Iraqis. The federal government shall manage it and shall allocate a portion of the resources to the producing regions. This shall be regulated by a law.

-- OPTION B: The wealth of oil and minerals belongs to all Iraqis. The federal government shall manage it in cooperation with the regional governments. The federal government shall allocate a portion of the resources to the productive regions. This shall be regulated in a law.

-- OPTION C: The natural wealth (oil, gas and minerals) is considered the property of all Iraqis and shall be exploited by the regional governments under the supervision of the federal government. Its revenues shall be distributed in accordance with the following percentages: 5 percent to the producing

governorate; 3 percent to the federal government; and 56 percent to the regional governments. (Comment: this is the version the Kurdish maximalists wanted - see ref b.)

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Part VI: Final Rulings  
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112. (C) The closing section on final rulings stays faithful to the TAL language on amendment provisions and Kirkuk, while offering an even broader mandate to the De-Ba'athification Commission.

-- MAINTAINING TOUGH AMENDMENT PROVISIONS: The proposed draft maintains a high standard for amending the constitution despite calls by some members for a document more malleable in its early years. The president and council of ministers can jointly propose an amendment or one fifth of the National Assembly members can propose an amendment. The amendment can only be voted into force by a two-thirds vote in the assembly or by a popular referendum.

-- OPEN MANDATE ON DE-BA'ATHIFICATION: The draft document defies the hopes of some delegates who wanted to see the constitution curtail or set a limit on the work of the De-Ba'athification Commission. It calls for the commission to continue its work "until the completion of its mission." The National Assembly can halt the work of the De-Ba'athification Commission only by a two-thirds vote.

-- REAFFIRMING THE IRAQI SPECIAL TRIBUNAL: The text notes that the work of the Iraqi Special Tribunal "shall continue."

-- FINESSING ARTICLE 58: The text aims to carry over the mandate for implementing TAL Article 58 without adding new complications or guarantees on the issue. It reads, "The federal government must take the necessary steps to complete the implementation of the requirements of Article 58 of the Transitional Administrative Law, especially part C." (Part C refers to the permanent disposition of Kirkuk.)

-- SILENT ON CONTINUATION OF EXISTING LAWS, AND INCOMPLETE ON RATIFICATION: The text is silent on what happens to existing Iraqi laws after the new constitution is ratified. The draft's provision for ratification of the constitution does not appear to incorporate the potential provincial veto incorporated in TAL Article 61C. This most likely is not intentional, as the referendum law recently approved by the TNA mirrors the language of Article 61C.

113. (U) REO HILLA, REO BASRA, REO MOSUL, and REO KIRKUK, minimize considered.

Khalilzad